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(Slip Opinion)

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**BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.**

_____)
In the Matter of:)
Goodyear Tire & Rubber Company) NPDES Appeal No. 92-5
Permit No. TX0005061)
_____)

[Decided May 21, 1993]

REMAND ORDER

Before Environmental Appeals Judges Nancy B. Firestone, Ronald L. McCallum, and Edward E. Reich.

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GOODYEAR TIRE & RUBBER COMPANY

NPDES Appeal No. 92-5

REMAND ORDER

Decided May 21, 1993

Syllabus

On September 11, 1992, this Board granted Goodyear Tire and Rubber Company's request for review of the denial of its Evidentiary Hearing Request in connection with the issuance of a National Pollutant Discharge Elimination System permit. The permit, No. TX0005061, was issued for Goodyear's Beaumont, Texas plant, which manufactures solution crumb rubber, together with hydrocarbon resins and isoprene monomers.

Goodyear sought review on several grounds. First, Goodyear contended that EPA Region VI had erred in setting limits for Outfall 001 based upon the application of both the Solution Crumb Rubber Effluent Limitation Guidelines and the newer Organic Chemicals, Plastics and Synthetic Fibers ("OCPSF") Industry Effluent Limitation Guidelines, which govern discharges from hydrocarbon resins and isoprene production. Goodyear argued that its combined discharge, which is treated together and discharged through a single outfall, is subject only to the Solution Crumb Rubber Guidelines, and is exempt from the OCPSF Guidelines under the exemption set forth in 40 C.F.R. §414.11(d). Second, Goodyear contended that should the OCPSF Guidelines apply, Region VI erred in imposing monitoring requirements for all 63 OCPSF priority pollutants when the plant discharges only four of those pollutants (toluene, phenol, benzene and nickel). Third, Goodyear contended that even if the OCPSF Guidelines apply, the Region erred in imposing permit limits on chromium, copper, cyanide, lead and zinc. Fourth, Goodyear contended that the limits set for nickel are not appropriate or achievable, and that to the extent a limit on zinc is appropriate the Region erred in setting inconsistent limits for zinc. Finally, Goodyear contended that Region VI erred in failing to take into account the fact that the plant had increased its production more than 30 percent over its 1980 production levels, when the Region set the plant's permit limits.

Held: The permit is remanded for the following reasons: First, Region VI erred in applying the OCPSF Guidelines to the plant's combined wastewater discharge. Nonetheless, specific OCPSF effluent limits may be appropriate as an exercise of the Region's Best Professional Judgment ("BPJ"). Therefore, the permit is remanded for new limits and monitoring requirements to be set. Second, Region VI should modify the permit on remand to eliminate the permit's inconsistent zinc limits. Third, because Solution Crumb Rubber effluent limits are set based on production volumes, Region VI must now allow Goodyear to submit a revised permit application that accurately reflects the plant's current production volumes.

The Board will not consider Goodyear's other objections because Goodyear failed to preserve its objections to: (1) the imposition of metal and cyanide limits using "BPJ" in its Evidentiary Hearing Request; and (2) the permit limits for nickel in its comments on the draft permit.

Before Environmental Appeals Judges Nancy B. Firestone, Ronald L. McCallum, and Edward E. Reich.

Opinion of the Board by Judge Firestone:

Goodyear Tire and Rubber Company ("Goodyear") sought review on April 2, 1992, of the denial of its evidentiary hearing request by U.S. EPA Region VI in connection with the issuance of National Pollutant Discharge Elimination System ("NPDES") Permit No. TX0005061. The permit was issued for Goodyear's Beaumont, Texas plant, which manufactures solution crumb rubber, together with hydrocarbon resins and isoprene monomers. The permit authorizes Goodyear to discharge into Kidd Gully, which leads into a navigable water of the United States.

GOODYEAR TIRE & RUBBER COMPANY

At issue in this proceeding is Outfall 001, which is used by Goodyear for discharging wastewaters generated by both its solution crumb rubber production process, as well as its hydrocarbon resin and isoprene monomer processes.

In May 1987, Goodyear filed an application with Region VI for renewal of the Beaumont plant's 1982 NPDES permit. EPA issued a draft permit for public comment on July 30, 1988. Goodyear submitted comments on the draft permit. Thereafter, on October 14, 1988, Region VI issued a final permit to be effective from November 15, 1988, until November 14, 1993. On November 11, 1988, Goodyear requested an evidentiary hearing to reconsider and contest Region VI's final permit decision. Region VI denied the request for an evidentiary hearing on February 25, 1992. Goodyear filed a timely notice of appeal and petition for review in April 1992 and, on September 11, 1992, this Board granted review in accordance with 40 C.F.R. §124.91.

I. BACKGROUND

Goodyear manufactures solution crumb rubber at its Beaumont plant together with several raw materials that go into the manufacture of the rubber, including hydrocarbon resins and isoprene. As noted above, the wastewater from all of these processes is combined, treated together, and discharged through a single outfall. The rubber and raw materials are, however, listed under different Standardized Industrial Classification ("SIC") Codes: the solution crumb rubber is listed under SIC Code-2822, hydrocarbon resins are listed under SIC Code-2821, and isoprene is listed under SIC Code-2869.

In May 1987, Goodyear filed a permit application with EPA Region VI seeking to renew its 1982 NPDES permit.¹ The effluent limitations in Goodyear's 1982 NPDES permit for Outfall 001 were based on the application of the Solution Crumb Rubber Effluent Guidelines set forth in 40 C.F.R. §428.30.² (Fact Sheet for the 1982 NPDES permit - Exhibit G to Petition for Review.) Shortly after Goodyear filed its May 1987 renewal application, EPA promulgated a new set of guidelines, the Organic Chemicals, Plastics and Synthetic Fibers ("OCPSF")

¹ Goodyear filed an amended renewal application on March 15, 1988, in which it explained that its production volume had increased by approximately 30% between 1980 and 1987 (Administrative Record at 340). Goodyear resubmitted this information on May 25, 1988, in a letter to the Region (Administrative Record at 18). As discussed later in this opinion, Goodyear contends that the Region erred in failing to consider Goodyear's production increase in setting permit limits.

² The Solution Crumb Rubber Effluent Guidelines apply to "discharges of pollutants resulting from the manufacture of crumb rubber." 40 C.F.R. §428.30.

Industry Effluent Guidelines, which set separate effluent limits for discharges from hydrocarbon resin and isoprene production. *See* 40 C.F.R. §414.10 *et seq.* By their terms, the OCPSF Guidelines apply to "discharges from all establishments or *portions of establishments* that manufacture * * * [OCPSF] products * * *," including products listed under SIC Code-2821 and SIC Code-2869. 40 C.F.R. §414.11(a) (emphasis added). The OCPSF regulation also provides, however, that certain discharges are exempt from its purview:

Notwithstanding paragraph (a) of this section, the provisions of this part are not applicable to any discharges for which a different set of previously promulgated effluent limitations guidelines and standards in this subchapter apply, unless the facility reports OCPSF products under SIC codes 2865, 2869, or 2821, and the facility's OCPSF wastewaters are treated in a separate treatment system or discharged separately to a publicly owned treatment works.

40 C.F.R. §414.11(d).

Because the Beaumont plant reports products identified under SIC codes 2822 (solution crumb rubber), 2821 (hydrocarbon resins), and 2869 (isoprene), Region VI determined that revised discharge limits should be set for the Beaumont plant using both the new OCPSF Guidelines and the Solution Crumb Rubber Guidelines. The Region concluded that the §414.11(d) exemption did not apply.

The draft permit for the Beaumont plant was issued for public comment on July 30, 1988. It included limitations for both conventional and 63 priority pollutants. On August 29, 1988, Goodyear submitted comments on the draft permit. Goodyear objected to the draft permit on several grounds. In the comments relevant to this appeal, Goodyear asserted that (1) the entire discharge from the Beaumont plant is exempt from the OCPSF Guidelines under the terms of the exemption set forth in 40 C.F.R. §414.11(d); (2) should the OCPSF Guidelines apply to the plant's discharge, permit limits and monitoring requirements should be set for only the 4 priority pollutants discharged by the plant (toluene, phenol, benzene and nickel), not all 63 OCPSF priority pollutants; (3) should the OCPSF Guidelines apply, Goodyear should not be subject to permit limits under the OCPSF Guidelines for any metals other than nickel;³ (4) "the draft permit establishes limits for a number of priority pollutants that are below analytical

³ *See* footnote 12 *infra*.

detection limits";⁴ and (5) the proposed effluent limits are based on outdated production data.⁵ (Administrative Record at 97-148.)

On October 14, 1988, Region VI issued a final permit decision. The Region rejected Goodyear's contention that the OCPSF Effluent Guidelines exemption extends to the portions of the discharge associated with the production of hydrocarbon resins or isoprene.⁶ The Region also rejected all of Goodyear's other comments on specific permit conditions. The Region nonetheless changed the permit based upon certain monitoring data submitted by Goodyear. More specifically, the Region agreed to reduce the monitoring frequency for certain metals from quarterly to annually. (Administrative Record at 62.)

Thereafter, on November 11, 1988, Goodyear filed a request for an evidentiary hearing in which it reiterated its earlier objections to the draft permit. (Administrative Record at 4-5.) In addition, Goodyear asserted for the first time, in its evidentiary hearing request, that the nickel limits set in the permit "are not supported by adequate data and have not been shown to be achievable," and that the Region had improperly imposed "two different sets of effluent limitations and monitoring requirements for zinc." (Administrative Record at 5.)

More than three years later, on February 25, 1992, Region VI denied Goodyear's evidentiary hearing request. The Region explained that (1) Goodyear's arguments concerning the application of the OCPSF Guidelines raise legal issues which are not appropriate for a hearing; (2) because the OCPSF Guidelines apply, monitoring for all 63 OCPSF priority pollutants is required under EPA's regulations; (3) Goodyear had failed to preserve its objections to the limitations set for nickel and zinc, because it had failed to raise them in its comments on the draft permit; (4) the Region did not have to consider the Beaumont plant's revised production data, because Goodyear had failed to submit the information in its permit renewal application; and finally (5) the Region had properly relied upon 40 C.F.R. §122.44(e), not the OCPSF Guidelines, in setting permit limits for chromium, copper, cyanide, lead and zinc. (Administrative Record at 29-31.)

⁴ As discussed later in this opinion, Goodyear contends that this comment should be construed as preserving its objection to the permit's nickel limits.

⁵ In its comments to the Region, Goodyear stated that it had increased production from 1980 to 1987 by approximately 30%. (Administrative Record at 97.) Goodyear later explained in its request for an evidentiary hearing, that this was achieved by modernizing its facility and adding a group of polybutadiene reactors and strippers. (Administrative Record at 15.)

⁶ The Region did agree that the OCPSF exemption did apply to discharges arising from the production of polybutadiene (one of the Beaumont plant's synthetic rubber products), and modified the final permit to reflect this determination. (Administrative Record at 62.)

Goodyear filed a timely appeal and petition for review on April 2, 1992. Following receipt of the Region's response, this Board, on September 11, 1992, granted review. Having received opening briefs from both parties and a reply brief from Goodyear this matter is now ready for decision.

II. DISCUSSION

A. Application of the OCPSF Guidelines

As set forth in the order granting review, this Board granted review to determine whether Region VI had erred in applying the OCPSF Guidelines to the portion of the Beaumont plant's discharge attributable to the manufacture of hydrocarbon resins and isoprene. Goodyear contends that the Beaumont plant is entitled to the exemption provided for under 40 C.F.R. §414.11(d) of the OCPSF Guidelines, and that the plant's single discharge should be regulated only under the Solution Crumb Rubber Guidelines.⁷

As noted above, 40 C.F.R. §414.11(d) provides in relevant part:

* * * [T]he provisions of this part are not applicable to any discharges for which a different set of previously promulgated effluent limitations * * * apply, unless the facility reports OCPSF products under SIC codes 2865, 2869, or 2821, and the facility's OCPSF wastewaters are treated in a separate treatment system * * *.

Goodyear asserts that the Beaumont plant meets the requirements of the exemption because: (1) a different set of effluent limitation guidelines -- the Solution Crumb Rubber Guidelines -- apply to the Beaumont plant's *entire* discharge, and (2) the wastewater from the SIC Code-2821 (hydrocarbon resins) and SIC Code-2869 (isoprene) production processes are not treated separately from the plant's other process wastewaters, but all are treated and discharged together through Outfall 001. In support of its position Goodyear relies extensively on EPA's *Development Document for Effluent Limitations and New Source Performance Standards for the Tire and Synthetic Segment of the Rubber Processing Point Source Category*

⁷ As discussed *infra*, the Region relied upon the OCPSF Guidelines and Solution Crumb Rubber Guidelines for setting permit limits except for chromium, copper, cyanide, lead and zinc. The Region apparently relied upon 40 C.F.R. §122.44(e) in setting limits for those metals and cyanide. Therefore, the discussion in Section A, focuses solely on the application of the OCPSF Guidelines to the Beaumont plant's other pollutants.

(hereinafter "Rubber Development Document"). (Administrative Record at 107-112). The *Rubber Development Document* identifies the Beaumont plant as one of the five rubber plants EPA evaluated in establishing the Solution Crumb Rubber Guidelines. In addition, the *Rubber Development Document* reveals that the Agency was aware of the plant's hydrocarbon resin and isoprene production activities when it used the facility as one of the bases for the rubber guidelines. Moreover, the document shows that the Agency knew that all of the plant's wastewater was treated and discharged together. Goodyear contends that the *Rubber Development Document* demonstrates that EPA, in establishing the rubber guidelines, took into account all of Goodyear's wastestreams. Accordingly, Goodyear argues that the facility's single discharge has been subject to previously promulgated effluent limitation guidelines, and that the plant therefore meets the first prong of the OCPSF exemption under 40 C.F.R. §414.11(d). In addition, Goodyear argues that because the Beaumont plant's wastestreams are not treated separately but are treated together, the plant meets the second prong of the §414.11(d) exemption. In these circumstances, Goodyear asserts that the Region erred in applying the OCPSF guidelines when it set the effluent limits for the Beaumont plant in 1988.

In response, Region VI argues that Goodyear is not entitled to the exemption because the portion of the discharge attributable to the Beaumont plant's OCPSF products (SIC Codes 2821 and 2869) "ha[s] never been previously regulated * * *." (Region VI's November 16, 1992 Brief at 7.) In support of its position, Region VI relies on an October 18, 1991, letter from Mr. Elwood Forscht, EPA Headquarters Chief of the Chemicals Branch in the Engineering and Analysis Division, to Mr. Thomas P. Behlen, an attorney with the City Attorney's Office in Columbus, Ohio (hereinafter "Forscht letter"), regarding the application of the OCPSF Guidelines to an indirect discharger in a matter unrelated to this permit proceeding. (Administrative Record at 370-371.) In explaining why the indirect discharger was not entitled to the exemption, the letter states:

The discharge referred to [in §414.11(d)] is the OCPSF process discharge, not the combined outfall discharge. In the context of effluent guidelines the effluent from each process is considered to be a discharge, even if it is combined with other process effluents before the ultimate outfall discharge. [Administrative Record at 371.]

Thus, the letter concludes that the portion of this discharger's wastewater which was not previously regulated is subject to the OCPSF guidelines, even though the OCPSF process wastestream was combined with other, previously regulated

wastestreams. (Administrative Record at 371-72.) Based on this letter, the Region concludes that the OCPSF exemption does not apply to the Beaumont plant. The Region relies on the fact that wastewater resulting from the isoprene and hydrocarbon resin production was not *specifically* regulated under the previously promulgated Solution Crumb Rubber Guidelines.

For the reasons set forth below, we find the Region's reliance on the Forscht letter misplaced and conclude that the Region erred in applying the OCPSF Effluent Limitation Guidelines in this case. We find that the plain language of the exemption, together with the preamble to the OCPSF Guidelines, 52 Fed. Reg. 42,523-24 (Nov. 5, 1987), and EPA's supporting *Development Document for Effluent Guidelines and Standards for the Organic Chemicals, Plastics and Synthetic Fibers Point Source Category* (hereinafter "OCPSF Development Document"), make it clear that the OCPSF regulation should not apply in this case.

First, the regulatory exemption simply states that the OCPSF Guidelines do not apply to previously regulated "discharges." That is, the exemption speaks in terms of previously regulated discharges, not previously regulated wastestreams. Mr. Forscht's attempt to redefine discharge to mean wastestream is contrary to the express language of the regulation which defines discharges to include "either the discharge of a single pollutant or * * * multiple pollutants." 40 C.F.R. §401.11(h).⁸ The term discharge of pollutants is, in turn, defined in relevant part to mean, "the addition of any pollutant to navigable waters from any point source." *Id.* Here, the wastewater from the hydrocarbon resin and isoprene processes is treated in combination with the solution crumb rubber wastewater and then directly "discharged," with the solution crumb rubber wastewater, through Outfall 001. It is that *combined discharge* that has been previously regulated.⁹

Further, the preamble to the OCPSF Guidelines goes on to explain with regard to the exemption that it was intended to cover the situation presented by the Beaumont plant:

The OCPSF regulation does not apply to discharges from OCPSF product/process operations which are covered by the provisions of other categorical industry effluent limitation

⁸ The OCPSF regulations provide that the "definitions * * * set forth in Part 401 of this Chapter shall apply to this part." 40 C.F.R. §414.10(a).

⁹ This combined treatment and discharge system is identified in a diagram attached to Goodyear's permit renewal application. (Administrative Record at 190.)

guidelines and standards if the wastewater is treated in combination with the non-OCPSF industrial category regulated wastewater * * *. [52 Fed. Reg. at 42523.]

Thus, where OCPSF wastewater has been subject to limitations under other, earlier promulgated industry effluent standards and is treated in combination with previously regulated non-OCPSF wastewater, the OCPSF exemption is met. The *OCPSF Development Document* further confirms this view. In the Summary and Conclusions section of the *OCPSF Development Document*, the Agency states:

The regulations are not applicable to any *discharges* for which a different set of previously promulgated effluent limitation guidelines and standards in *40 C.F.R. Parts 405 through 699* apply, unless the facility reports OCPSF production under SIC codes 2865, 2869 or 2821, and the facilities OCPSF wastewater is treated in a separate treatment system or discharged separately to a POTW. [OCPSF Development Document at II-6j (emphasis added).]

Here, Goodyear has shown that EPA was aware of the entire Beaumont plant's *discharge* when it established the Solution Crumb Rubber Guidelines. (Administrative Record at 11.) These Guidelines appear at 40 C.F.R. §428.30. Further, there is no dispute that the plant's OCPSF and non-OCPSF wastewater is combined for treatment and *discharge*. Finally, the parties agree that in the past this single discharge has been subject to limitations established in the Solution Crumb Rubber Guidelines.

In these circumstances, the Region's contention that the exemption applies only when the OCPSF product *wastewater* was expressly subject to a separate set of previously promulgated standards is not supportable. The Region's view is not supported by the plain language of the exemption, the preamble to the regulation, nor the *OCPSF Development Document*. Thus, we conclude that Region VI erred in applying the OCPSF Guidelines to any portion of the combined discharge from the Beaumont plant.¹⁰

¹⁰ We note that this opinion turns largely on the unique facts surrounding the role the Beaumont plant played in the development of the Solution Crumb Rubber Guidelines. This opinion does not resolve the broader issue of whether the OCPSF exemption applies in *all* cases where OCPSF and previously regulated non-OCPSF wastestreams are combined into a single discharge.

Our conclusion that the OCPSF regulation does not directly apply to any of the plant's discharge does not, however, end our inquiry. The Beaumont plant continues to discharge contaminants and pollutants which, but for the §414.11(d) exemption, would be subject to specific OCPSF effluent limitations. As such, the Region must now be given the opportunity to determine whether certain OCPSF effluent limitations are appropriate based upon the Region's application of Best Professional Judgment ("BPJ").¹¹ Indeed, the preamble to the OCPSF regulation expressly notes that the OCPSF regulation will likely support limitations based upon BPJ:

[T]he OCPSF data base and effluent limitations and standards provide permit issuing authorities with guidance for establishing Best Professional Judgment ("BPJ") permits for OCPSF production activities to which this regulation does not apply * * *.

[E]ven in cases where priority pollutants from OCPSF production covered by other categorical standards * * * have been excluded by these regulations * * *, BPJ priority pollutant regulation for individual plants having OCPSF production may be appropriate.

52 Fed. Reg. at 42523. Accordingly, this permit is remanded with instructions for the Region to establish permit provisions for Outfall 001 based upon the application the Solution Crumb Rubber Guidelines and, if appropriate, BPJ.

¹¹ As discussed *infra*, the Region used BPJ to set the limits only for chromium, cyanide, copper, lead and zinc.

B. Monitoring Requirements

As noted above, the present permit requires that Goodyear monitor all 63 OCPSF priority pollutants. Goodyear argues that to the extent the OCPSF Guidelines apply to the Beaumont plant's discharge, Region VI erred in imposing "burdensome and unnecessary monitoring requirements" in the permit. (Brief in Response to Order Granting Review at 13.) The Region acknowledges in its Response to the Petition at 5, that this issue is dependent on the determination made with regard to the application of the OCPSF Guidelines in the first instance. Having concluded that the OCPSF Guidelines do not apply and having remanded the permit for that reason, we also instruct the Region to remove the existing monitoring requirements from the permit. Any new monitoring requirements should be consistent with the Region's final determination on appropriate effluent limitations.

*C. Effluent Limitations For Chromium,
Copper, Lead, Zinc and Cyanide*

Goodyear argues that Region VI erred in imposing effluent limitations on chromium, copper, cyanide, lead and zinc. In particular, Goodyear contends that metal limits and cyanide limits are not appropriate under the OCPSF Guidelines, set forth at 40 C.F.R. §414.91.¹² In addition, Goodyear contends for the first time that to the extent the Region is relying on its best professional judgment to support the limits under 40 C.F.R. §122.44(e), Goodyear's metal and cyanide discharge does not warrant any limitation. More specifically, Goodyear argues that the Region has no basis for imposing any BPJ limits under §122.44(e), because:

In Goodyear's case, the demonstrated levels of chromium, copper, lead and zinc are significantly less than the maximum

¹² 40 C.F.R. §414.91 provides that OCPSF effluent limitations for chromium, copper, lead, nickel, zinc and total cyanide apply only if the waste stream is listed in Appendix A to the regulation or the process waste stream contains significant amounts of these metals or cyanide. The Region does not dispute that the Beaumont plant does not fall under §414.91 of the OCPSF guidelines except for nickel. The Region explained, in its response to comments and in its denial of Goodyear's Evidentiary Hearing Request, that it relied upon its best professional judgment ("BPJ"), as provided for in 40 C.F.R. §122.44(e)(1) in setting limits for the chromium, copper, lead, cyanide and zinc. Section 122.44(e)(1), in turn, provides:

(1) Limitations must control all toxic pollutants which the Director determines * * * are or may be discharged at a level greater than the level which can be achieved by the technology-based treatment requirements appropriate to the permittee under §125.3(c).

monthly limitations contained in the OCPSF regulations * * *. Therefore, the Regional Administrator's decision * * * is legally and factually unsupported and is a clearly erroneous interpretation of EPA's regulations.

Petition for Review at 8.

It is our view that Goodyear's objection to the imposition of these effluent limits based on BPJ comes too late, and therefore we will not consider Goodyear's arguments on appeal. Throughout the proceedings on this permit, Goodyear has contended that the Region improperly imposed effluent limits under the OCPSF Guidelines. As we have determined, the Region's reliance on the OCPSF Guidelines in setting numerous limits was improper. Nonetheless, from the outset the Region has clearly indicated that it based the permit's chromium, copper, lead, zinc and cyanide effluent limits on its best professional judgment. For example, in the Region's response to Goodyear's comments to the draft permit on the grounds that the OCPSF regulation did not apply, the Region stated:

It is the best professional judgement of the permit writer that the effluent limitations and monitoring requirements in the draft permit are reasonable. This is based upon the limited information available to consider and the obligation of the permit writer to identify any additional process wastewater streams which may contain metals or cyanide for regulation in the permit.

Administrative Record at 67. Despite the Region's express reliance on BPJ in its response to comments, Goodyear, in its Evidentiary Hearing Request, objected to the imposition of effluent limits for metals and cyanide on the *sole* ground that the limits were not required under the OCPSF Guidelines.

[T]he OCPSF Guidelines provide that the metal limits apply only to the process wastestreams listed in Appendix A. The Beaumont plant does not generate any of the wastestreams listed in Appendix A. As a result, there is no basis for the imposition of limits on chromium, copper, cyanide, lead or zinc.

Administrative Record at 9.

In these circumstances, Goodyear cannot now be heard to argue that the Region improperly set metal limits and a cyanide limit based on the Region's

application of best professional judgment. To preserve an issue for appeal, an NPDES permit applicant must raise that issue in its request for an evidentiary hearing. 40 C.F.R. §124.74; *In re Sequoyah Fuels Corporation*, NPDES Appeal No. 91-12 (EAB Aug. 31, 1992). By not asserting its objection regarding the imposition of standards based on best professional judgment in its Evidentiary Hearing Request, Goodyear waived its objection and failed to preserve the issue for consideration by this Board.

D. The Effluent Limitations For Nickel

Goodyear contends that the Beaumont plant's permit imposes effluent limitations for nickel that are not supported by adequate data and are not shown to be achievable. (Brief in Response to Order Granting Review at 15.) In response, the Region argues that Goodyear failed to raise this issue during the comment period on the draft permit and, therefore, the issue has not been preserved for review. (Response to Petition for Review at 7.) We agree with the Region and hold that the issue was not preserved for the Board's consideration.

Under 40 C.F.R. §124.13, any person who believes that a permit condition is inappropriate must raise "all reasonably ascertainable issues and * * * all reasonably available arguments supporting [the person's] position by the close of the public comment period." Accordingly, in order to contest a final permit condition in an evidentiary hearing, that condition must first be identified during the comment period. *In re NPC Service*, NPDES Appeal No. 91-4 (May 30, 1991). Goodyear concedes that in its comments on the draft permit it "did not phrase this issue in the exact language used in its request for an evidentiary hearing" (and as now reflected in its brief). Nonetheless, Goodyear asserts that the Region was adequately apprised of the issue in "Comment 6" of its comments to the draft permit. (October 23, 1992 Brief at 16.) Based on our review of "Comment 6," we conclude that Goodyear did not preserve any issues relating to nickel when commenting on the draft permit.

In "Comment 6," Goodyear objected to the draft permit on the grounds that "the draft permit establishes limitations at concentrations that are not analytically detectable." (Administrative Record at 100.) Nowhere in the comment does Goodyear expressly question the basis for the nickel limitation or contend that it cannot achieve the nickel limit. Indeed, there is no mention of nickel at all in Comment 6. Rather, the thrust of the comment appears to have been a request that "no permit limits be established that are below the appropriate practical quantitation limit ("PQL") for the compound being regulated." (Administrative Record at 101.)

In these circumstances, Goodyear did not preserve for review its objections to the permit's nickel limitations. Moreover, Goodyear does not argue that this Board should consider its objections to the nickel limit under the "good cause" exemption provided for under 40 C.F.R. §124.76.¹³ For these reasons, the nickel limitations established in the Beaumont plant's permit will not be examined by this Board.¹⁴

E. The Effluent Limitations For Zinc

Goodyear also objects to the effluent limits set for zinc in the Beaumont plant's permit. In particular, Goodyear claims that the final permit contains two inconsistent effluent limitations and monitoring requirements. (Brief in Response to Order Granting Review at 16.) In response, Region VI argues that Goodyear failed to preserve this issue during the comment period on the draft permit. (Response to Petition for Review at 7.) Nonetheless, the Region concedes the error and states that until such time as a minor permit modification can take place, Goodyear "would be held to the less stringent of the two limits." (Response to Petition for Review at 7.)

As noted above, we are remanding the Beaumont permit to the Region so that the permit can be revised in accordance with this opinion. On remand, the Region should modify the permit to reflect a zinc effluent limit and monitoring requirement consistent with the Region's representations on appeal.

F. Production Data

Finally, Goodyear challenges the Beaumont plant's permit on the grounds that Region VI erred in basing the permit's effluent limits on outdated solution

¹³ Under 40 C.F.R. §124.76, a party may raise an issue not previously identified during the comment period where "it could not reasonably have ascertained the issue * * * within the time required * * * or reasonably anticipated the relevance or materiality of the information sought to be introduced." Here, Goodyear could not reasonably make such claims. We note that in Goodyear's "Comment 5" to the draft permit Goodyear apparently agreed that at least some permit limit for nickel was appropriate. (Administrative Record at 99.) In particular, Goodyear stated: "permit limits should not be set for metals *other than nickel*" (emphasis added). Accordingly, to the extent Goodyear had objections to the nickel limit set by the Region, it should have raised them in its comments.

¹⁴ Nonetheless, we note that because it appears from the Administrative Record that the Region relied upon the OCPSF Guidelines in setting the nickel limit, the limit will need to be repropose in accordance with Section A of this opinion. Accordingly, Goodyear will be able to raise objections to any new nickel limit in comments to a new draft permit. See 40 C.F.R. §124.60(b); cf. *In re City and County of San Francisco*, NPDES Appeal No. 91-18 at 18, (EAB Mar. 24, 1993).

crumb rubber production data. In particular, Goodyear argues that effluent limitations for solution crumb rubber facilities are to be set based on pounds of pollutant per 1000 pounds of product and that the Region erred in failing to consider the updated production data Goodyear submitted in its comments to the draft permit. (Brief in Response to Order Granting Review at 17.)

The Region argues, in response, that the Region did not consider Goodyear's data because Goodyear failed to "provide the information in its permit renewal application." (Response at 8.) More specifically, the Region states that under the rules governing permit applications, 40 C.F.R. §122.22(d), Goodyear was obliged to provide accurate production data, and that the Region was not required to consider the data when they were first presented in Goodyear's comments on the draft permit.

As noted above (footnote 1, *supra*), our review of the Administrative Record reveals that Goodyear did put the Region on notice of the plant's rubber production increase in its amended permit renewal application (Administrative Record at 340) and in a letter to the Region which predates the draft permit. (Administrative Record at 18.) As such, the Region's contention that it did not receive the data until after issuance of the draft permit is not supported by the record. More importantly, however, now that we have concluded that the Region must revise this permit to reflect our ruling on the inapplicability of the OCPSF Guidelines, the Region's assumptions about the appropriate permit limits have fundamentally changed. Indeed, the Region recognized that the production data would become more important if this Board were to conclude that the OCPSF Guidelines do not apply. (Response to Petition for Review at 8.)

In these circumstances, we believe that the Region should allow Goodyear to submit an amended permit renewal application which reflects the Beaumont plant's current production volumes so that appropriate effluent limitations may be set.¹⁵ *See In re Miners Advocacy Council*, NPDES Appeal No. 91-23 at 5 (EAB Sept. 3, 1992) (reopening the application process may be appropriate to allow for an equitable resolution where the Region's original legal assumptions regarding the permit have been rejected by the Board). Therefore, we are remanding this permit with the direction that Region VI provide Goodyear with the opportunity to submit

¹⁵ In its response to comments, Region VI explained that it could not consider Goodyear's production increase in part because Goodyear had not complied with the new source review requirements under 40 C.F.R. §122.41(l). To the extent Goodyear's production increase triggers new source review, as suggested by Region VI, nothing in this opinion should be construed as limiting Goodyear's obligation to comply with those requirements.

an amended permit application to include accurate and complete information on the Beaumont plant's current rubber production volumes.

III. *CONCLUSION*

For the above-stated reasons, we are remanding this permit to the Region to establish appropriate permit limitations consistent with the holdings in this opinion. First, the Region must now allow Goodyear to submit an amended permit application that accurately reflects the plant's current production volumes. Second, new permit limits for Outfall 001 must be set using the Solution Crumb Rubber Guidelines and, if appropriate, BPJ. Third, the limits for chromium, lead, copper and cyanide, which were based on the application of BPJ, are not altered by this decision and may remain in the permit. Fourth, the Region shall modify the permit to eliminate the permit's inconsistent zinc limits. Final agency action for all issues concerning this permit shall occur only upon completion of the administrative appeals process to the Board from the remanded proceeding. 40 C.F.R. §124.91(f).

So ordered.